

NOTICE: Summary decisions issued by the Appeals Court pursuant to M.A.C. Rule 23.0, as appearing in 97 Mass. App. Ct. 1017 (2020) (formerly known as rule 1:28, as amended by 73 Mass. App. Ct. 1001 [2009]), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 23.0 or rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

20-P-559

MICHAEL L. ALFIERI

vs.

MERRIMACK PHARMACEUTICALS, INC., & others.¹

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

The plaintiff, Michael L. Alfieri, filed this action against the defendants alleging breach of written contract, breach of oral contract/promissory estoppel, and violation of the Wage Act (act), G. L. c. 149, § 148. A judge of the Superior Court granted summary judgment in favor of the defendants on all counts, and the plaintiff appealed. We affirm.

Background. The following material facts are undisputed. On May 21, 2014, Merrimack Pharmaceuticals, Inc. (Merrimack) sent the plaintiff a letter offering him employment as corporate controller of the company. In the letter, Merrimack offered to compensate him as follows:

¹ Richard Peters and William Sullivan.

"Total Cash Compensation: The Company currently uses total target cash compensation ('TTCC') to compensate its employees. A percentage of the TTCC for each employee is retained and expected to be paid in the first quarter of the following year presuming that (i) the employee is an active employee of the Company on the date that the retention is paid, (ii) the employee is continuing to meet expectations and (iii) the Company is performing adequately, as determined by the Company's Board of Directors (the 'Board'). The remainder of each employee's TTCC is paid over the course of the year as salary. For 2014, your annualized TTCC will be \$260,000 of which \$208,000 will be paid as salary and \$52,000 will be retained, in each case less all applicable taxes and withholdings. Your TTCC for 2014 will be prorated based on your date of hire. Your TTCC will be paid in accordance with the Company's standard payroll practices and will be subject to periodic review and adjustment in the sole discretion of the Company."

By its express terms, this offer superseded "all prior understandings, whether written or oral, relating to the terms of [the plaintiff's] employment." On May 30, 2014, the plaintiff signed the letter and accepted the offer of employment.² The plaintiff began his employment at Merrimack on July 14, 2014.

In 2014, in accordance with the offer letter, the plaintiff was paid \$208,000 of his TTCC in biweekly installments. On February 13, 2015, he received the retained portion of his 2014 TTCC, the payment of which was designated as "bonus" on the plaintiff's paycheck. In 2015, the plaintiff was paid \$212,160 of his TTCC in biweekly installments, and he received the

² The only alteration the plaintiff made to the terms of the offer letter was his start date.

retained portion of his 2015 TTCC on February 12, 2016. The amount was again designated as "bonus" on the plaintiff's paycheck.

On October 3, 2016, Merrimack announced that it was laying off approximately one hundred employees. Though the plaintiff was not one of those employees, he was notified shortly thereafter that Merrimack was planning to sell a portion of its business and his position was likely to be eliminated. As a result, the plaintiff began to pursue other employment opportunities.³ On December 14, 2016, the plaintiff notified Merrimack's senior vice president of finance and treasurer, William Sullivan, that he had accepted an offer of employment from another company, and would begin his new position on January 9, 2017. When the plaintiff inquired about receiving the retained portion of his 2016 TTCC, Sullivan informed him that, to receive the retained portion, the plaintiff had to be employed at Merrimack "on the day that the reserves are paid out." Sullivan informed the plaintiff that Merrimack had not yet determined when it would be making those payments.

³ While the defendants and the plaintiff dispute whether the plaintiff began to consider other employment opportunities prior to the October announcement, the dispute is not material. See Dennis v. Kaskel, 79 Mass. App. Ct. 736, 741 (2011), quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986) ("a fact is 'material' when it 'might affect the outcome of the suit under the governing law'").

The plaintiff received \$217,600 of his 2016 TTCC in biweekly installments throughout the year, and his employment at Merrimack ended on January 6, 2017. In April 2017, after the closing of the sale of a portion of its business, Merrimack paid its employees the retained portions of their 2016 TTCCs. The plaintiff did not receive his 2016 retention, which would have amounted to \$54,400, because he was no longer an employee at Merrimack.

The plaintiff filed suit against the defendants arguing the defendants' failure to pay him the retained portion of his 2016 TTCC violated the act, G. L. c. 149, § 148, and constituted a breach of written and oral contract. He also sought to recover under a theory of promissory estoppel. The defendants filed a motion for summary judgment, and following a hearing, summary judgment entered in favor of the defendants. This appeal followed.

Discussion. "Summary judgment is appropriate where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law." Boazova v. Safety Ins. Co., 462 Mass. 346, 350 (2012). When "the opposing party will have the burden of proof at trial, the moving party must demonstrate, by reference to materials properly in the summary judgment record, unmet by countervailing materials, 'that the party opposing the motion has no reasonable expectation of

proving an essential element of that party's case.'" Carey v. New England Organ Bank, 446 Mass. 270, 278 (2006), quoting Kourouvacilis v. General Motors Corp., 410 Mass. 706, 716 (1991). "We review a decision to grant summary judgment de novo." Boazova, supra.

1. Wage Act. The plaintiff argues that the retained portion of his 2016 TTCC constituted a "wage" under the act, and thus Merrimack's failure to pay him the \$54,400 sum was in violation of the act. We disagree.

"The Wage Act requires that a terminated employee be paid his or her 'wages' expeditiously after his or her termination." O'Connor v. Kadrmas, 96 Mass. App. Ct. 273, 286 (2019). While the term "wages" is not expressly defined by the act, it has been construed to mean "salary (or more colloquially 'pay'), from an employer to an employee, including holiday and vacation pay, and certain delineated commissions." Id. at 287, citing G. L. c. 149, § 148. Commissions are "[t]he only contingent compensation recognized expressly in the act."⁴ Tze-Kit Mui v. Massachusetts Port Auth., 478 Mass. 710, 713 (2018). The term "wages" has not been broadly construed to encompass any other type of contingent compensation. Id. As a result, to fall within the meaning of "wages" for the purposes of the act, the

⁴ The plaintiff concedes that the retained portion of his TTCC is not a commission.

form of compensation "can be neither discretionary nor contingent." O'Connor, supra at 288.

Here, based on the plain language of the offer letter, the plaintiff's receipt of the retained portion of his TTCC was contingent upon the satisfaction of three conditions. Specifically, the offer letter states that the retention is "expected to be paid in the first quarter of the following year presuming that (i) the employee is an active employee of the Company on the date that the retention is paid, (ii) the employee is continuing to meet expectations and (iii) the Company is performing adequately, as determined by the Company's Board of Directors." Notably, the plaintiff's satisfaction of two of those conditions rested upon discretionary decisions by the Board whether the plaintiff was "meet[ing] expectations,"⁵ and whether the company was "performing adequately."⁶ This form of compensation is simply not contemplated by the act and falls outside of its purview. See Weems v. Citigroup, Inc., 453 Mass. 147, 153-154 (2009) (discretionary bonus of stock options, which was contingent upon employment with company when options vested, did not constitute "wages" under act); Prozinski v. Northeast Real Estate Servs., LLC, 59 Mass. App. Ct. 599, 603 (2003)

⁵ The defendants do not dispute that the plaintiff was meeting expectations.

⁶ We note that Merrimack recorded a net loss each year that the plaintiff was employed at the company.

(severance pay contingent upon severance from company did not qualify as "wages" under act). See also O'Connor, 96 Mass. App. Ct. at 288 (distributions pursuant to stock agreement were not "wages" under act due, in part, to "highly contingent nature"). Accordingly, the retained portion of the plaintiff's 2016 TTCC was not a "wage," and its payment is not governed by the act.

Furthermore, the plaintiff's contention that this type of compensation plan constitutes a "special contract" prohibited by the act is unpersuasive. See G. L. c. 149, § 148. "The Wage Act prohibits an employer from exempting itself from the timely and complete payment of wages by 'special contract'" (emphasis added), Fraelick v. PerkettPR, Inc., 83 Mass. App. Ct. 698, 707 (2013), which the retained portion of the plaintiff's 2016 TTCC was not. The agreement in no way exempted Merrimack from paying the plaintiff his "wages earned," and it is undisputed that he received the salary portion of his TTCC in biweekly installments. See G. L. c. 149, § 148.

2. Breach of written contract. The plaintiff next contends that summary judgment was erroneously granted in favor of the defendants on his breach of written contract claim because the judge failed to accord terms of the offer letter, specifically the terms "retained" and "annual compensation," with their plain and ordinary meaning. In the alternative, he

argues that the offer letter was ambiguous, and thus summary judgment was precluded. We are not persuaded.

"It is a well-settled rule of contract interpretation that to determine 'whether an agreement is clear and unambiguous, the document must be viewed in its entirety and its language be given its plain, ordinary and usual meaning.'" Siebe, Inc. v. Louis M. Gerson Co., 74 Mass. App. Ct. 544, 549 (2009), quoting W.P. Assocs. v. Forcier, Inc., 637 A.2d 353, 356 (R.I. 1994). "A term is ambiguous only if it is susceptible of more than one meaning and reasonably intelligent persons would differ as to which meaning is the proper one." Citation Ins. Co. v. Gomez, 426 Mass. 379, 381 (1998). "[A]n ambiguity is not created simply because a controversy exists between the parties, each favoring an interpretation contrary to the other." Id., quoting Lumbermens Mut. Cas. Co. v. Offices Unlimited, Inc., 419 Mass. 462, 466 (1995).

Here, the offer letter is unambiguous. It plainly states that the plaintiff must be an active employee at Merrimack on the date that retentions are paid in order to receive the retained portion of his TTCC. The plaintiff was not an employee at Merrimack in April 2017, when the 2016 retentions were paid. Thus, Merrimack had no obligation to pay him the 2016 retention, and as a result, he cannot demonstrate an essential element of his claim. See Singarella v. Boston, 342 Mass. 385, 387 (1961).

Any dispute over the meaning of the term "annual compensation" is immaterial where that term does not appear in the agreement,⁷ and the plaintiff's bare disagreement with the judge's interpretation of the word "retained" is insufficient to overcome Merrimack's well-supported motion for summary judgment.⁸ See Citation Ins. Co., 426 Mass. at 381 ("the mere existence of multiple dictionary definitions of a word, without more, [does not] suffice to create an ambiguity").

3. Breach of oral contract/promissory estoppel. The plaintiff claims that the defendants made an oral promise to him to pay him a specified annual salary, in which the \$54,400 retention payment was included. He argues that the failure to fulfill that promise constitutes a breach of an oral contract. In the alternative, he argues that he should be permitted to recover under the theory of promissory estoppel because the promise induced him to work for Merrimack to his detriment. The claims are meritless.

The promise on which the plaintiff purports to rely was made before he signed the offer letter. By its terms, that letter superseded any prior oral understanding relating to the

⁷ Instead, the offer letter uses the term "annualized TTCC" and explains that of the plaintiff's \$260,000 annualized TTCC, \$208,000 would be paid to him as salary, and \$52,000 would be retained pursuant to the enumerated conditions.

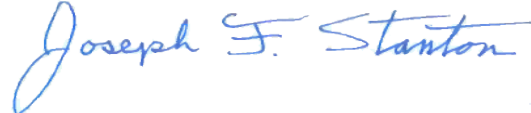
⁸ The plaintiff has not offered an alternative definition.

terms of the plaintiff's employment. Any such understanding therefore "merged in the written contract," Canney v. New England Tel. & Tel. Co., 353 Mass. 158, 165 (1967), the existence of which precludes recovery under a theory of promissory estoppel. See Malden Police Patrolman's Ass'n v. Malden, 92 Mass. App. Ct. 53, 61 (2017) ("Where an enforceable contract exists, however, a claim for promissory estoppel will not lie").

For all of these reasons, summary judgment was properly granted in favor of the defendants.⁹

Judgment affirmed.

By the Court (Wolohojian,
Desmond & Grant, JJ.¹⁰),



Clerk

Entered: April 12, 2021.

⁹ The defendants' requests for costs pursuant to Mass. R. A. P. 26 (a), as appearing in 481 Mass. 1655 (2019), and for double costs pursuant to Mass. R. A. P. 25, as appearing in 481 Mass. 1654 (2019), are denied.

¹⁰ The panelists are listed in order of seniority.